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Chairman: Mr. Diaz Paniagua (Vice Chairman) ..... (Costa Rica)
later: Mr. Bennouna (Chairman) ..... (Morocco)

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In the absence of Mr. Bennouna (Morocco), Mr Diaz Paniagua (Costa Rica), Vice-Chairman, took the Chair.

The meeting was called to order at 9.40 a.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/50/10)

1. **Mr. Melescanu** (Chairman of the International Law Commission), introducing chapters V and VI of the Commission's report (A/59/10), said that chapter V, dealing with the responsibility of international organizations, contained four draft articles on the attribution of conduct to international organizations, which was one of the conditions determining the existence of an internationally wrongful act on the part of such an organization.

2. In that context, it had been noted that the same conduct might be attributable to a State and an international organization, or to two or more international organizations. Articles 4 to 7 were similar in many respects to the corresponding draft articles on responsibility of States for internationally wrongful acts in that they concerned the attribution of conduct, not the attribution of responsibility, and set out only positive criteria of attribution. The implication of those articles was therefore that the conduct of military forces of States or international organizations was not attributable to the United Nations when the Security Council authorized States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations. The draft articles did not cover conduct which had taken place in the absence or default of the official authorities, or the conduct of an insurrectional or other movement, but it was understood that if such an issue were to arise with respect to an international organization, the pertinent rules for States set forth in articles 9 and 10 of the draft articles on responsibility of States for internationally wrongful acts would apply by analogy to that organization.

3. The essential criterion in article 4, paragraph 1, namely that the organ or agent must be acting in the performance of functions conferred by the organization in question, reflected the jurisprudence of the International Court of Justice. The provision did not, however, specify different types of function, since they could offer substantially from one international organization to another. The term "governmental authority" had likewise been eschewed as being inappropriate in that context. When persons or entities were characterized as organs by the rules of their organization, their conduct was plainly attributable to the organization, but it had been considered useful to define the term "agents" for the purpose of attribution. That definition had been based on the advisory opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*. The criterion contained in paragraph 3, which stated that the rules of the organization should apply to the determination of the functions of its organs and agents, was not intended to constitute a hard and fast rule and, in exceptional circumstances, it might be possible to hold that functions had been given to an agent or organ, even if that could not be said to be based on the rules of the organization.

4. Paragraph 4, containing a definition of the rules of the organization, was largely modelled on the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the one substantive difference being that the definition in the draft article was intended to cover more comprehensively the wide variety of functions performed by international organizations. For the purpose of article 4, the decisions, resolutions and other acts of the organization were relevant, whether they were binding or not, if they gave functions to organs or agents in accordance with the constituent instrument of the organization. The provision was intended to lend considerable weight to the practice of an organization. Since the definitions contained in article 4 had far-reaching implications, the Commission might decide, at a later stage, to move them to article 2.

5. The approach adopted in article 5 relating to the conduct of organs or agents placed at the disposal of an international organization by a State or another international organization was similar to that of article 6 of the draft articles on State responsibility and reflected the practice of international organizations, particularly that of the United Nations with respect to peacekeeping forces. The operative criterion for the attribution of conduct in that case was the exercise of effective control over the specific conduct of the organ or agent.

6. Article 6 referred to cases in which an organ or agent exceeded its authority or contravened instructions. It also covered instances in which the

conduct in question likewise exceeded the competence of the organization. It closely resembled article 7 of the draft articles on State responsibility and was intended to convey the need for a close link between ultra vires conduct and the functions of the organ or agent. Because it was necessary to protect third parties, the article in question concerned only the question of attribution and did not prejudge the validity of the act under the rules of the organization, or the responsibility of the international organization for valid or invalid acts.

7. Article 7 on conduct acknowledged and adopted by an international organization as its own indicated that the attribution of such conduct was based on the attitude of the organization and mirrored article 11 of the draft articles on responsibility of States.

8. In his third report, the Special Rapporteur intended to investigate breach of an international obligation, circumstances precluding wrongfulness and responsibility of an international organization in connection with the wrongful act of a State or another organization. It would therefore be useful if Governments were to express their views on the extent to which the Commission, when studying the responsibility of international organizations under international law, should consider breaches of obligations that an international organization might have towards its member States or agents. The Commission also wished to know if "necessity" could be invoked by an international organization as a circumstance precluding wrongfulness in circumstances similar to those referred to in article 25 of the draft articles on State responsibility. Governments' comments would further be appreciated on the question whether an international organization would be regarded as responsible under international law if a Member State's conduct in compliance with a request from the organization appeared to be in breach of an international obligation of both the State and the organization. Would the answer be the same if the State's wrongful conduct had not been requested, but only authorized by the organization? The Commission had circulated its annual report to some international organizations with a view to likewise obtaining their views on those matters.

9. Turning to chapter VI, he said that work on the topic "Shared natural resources" was still in its preliminary stages, and the Commission would therefore welcome detailed and precise information from Governments about bilateral or regional practice relating to the allocation of groundwaters from transboundary aquifer systems and to the management of non-renewable transboundary aquifer systems. It would also be helpful if States were to give due consideration and respond to a questionnaire in which the Special Rapporteur had requested their views on transboundary groundwaters.

10. In his second report, the Special Rapporteur had proposed a general framework and a set of six draft articles. The proposed general framework comprised seven parts and was based largely on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, although it had been acknowledged that the principles of that Convention could not be applied mutatis mutandis to groundwaters. The six draft articles, which were to be contained in parts I and II of the general framework entitled respectively "Introduction" and "General principles", were to be found in footnotes 323 to 328 to the Commission's report.

11. No decision had been taken about the final form of the draft articles and diverging views had been expressed as to whether preference should be given to a framework convention, a model law, or guidelines to assist States in drafting bilateral and regional agreements other than conventions. The Special Rapporteur had therefore proposed draft articles in order to elicit specific comments, encourage an informed debate and identify additional areas requiring examination. Consequently, the draft articles had not yet been referred to the Drafting Committee of the Commission.

12. The Special Rapporteur's report had introduced several new elements. Owing to the sensitive nature of the term "shared", the Special Rapporteur had suggested that it should be replaced by "transboundary" and that it would be scientifically more precise to refer to "aquifer" and "aquifer system", rather than "groundwaters". The term "confined groundwaters" had been dropped, since, for groundwater experts, the word "confined" had a meaning different from that employed in the Convention on the Law of the Non-navigational Uses of International Watercourses. It had also been felt that the use of that term would unduly limit the scope of the topic by excluding some extremely important aquifers from the ambit of the draft articles. In addition, the Special Rapporteur had proposed that activities other

than the use of transboundary groundwaters should be regulated in order to protect those waters from pollution caused by surface activities. The general framework might be subject to further revision, because the subject-matter was highly specialized and State practice in that area was scarce. While the terminological changes proposed by the Special Rapporteur had received general support, some of the terms used required more precise definition. The relationship between the Convention on the Law of the Non-navigational Uses of International Watercourses and the study of groundwaters required further clarification and might form the subject of a draft article. Caution was, however, required in respect of reliance on that Convention, which had not yet entered into force, and on the draft articles on the prevention of transboundary harm from hazardous activities, which had still to be adopted by the General Assembly. While some members wished to place more emphasis on the primary role of the State in deciding on the appropriate use of groundwater resources, others had stressed the role of regional arrangements. A number of members had, however, taken the view that the Commission's work would be complementary to national and regional approaches.

13. Although some of the principles incorporated in the Convention on the Law of the Non-navigational Uses of International Watercourses were equally applicable to groundwaters, some modifications might be required in order to cater for the special characteristics of groundwaters. Great care might be required in respect of the principles of equitable use and reasonable utilization and it might be necessary to include principles concerning environmental protection, the sustainable use of aquifers and the protection of vital human needs. Some doubts had been voiced about the threshold of "significant harm" in connection with the obligation not to cause harm, since groundwater resources were more vulnerable than surface waters. It had also been suggested that the principles of inter-generational equity and respect for environmental integrity should be borne in mind.

14. **Mr. Lammers** (Netherlands) said that international regulation of the uses of and factors impacting on shared natural resources was of the greatest significance to his country. His Government was therefore concerned about the Commission's narrow treatment of the topic. Although it had been acknowledged that migratory species and all mineral deposits not within the jurisdiction of a single State were subsumed within the concept of shared natural resources, the Commission had from the outset limited its examination of the subject to groundwater, oil and gas and thus far the debate had been confined to groundwaters, or more specifically to aquifers, i.e. permeable water-bearing rock formations capable of yielding exploitable quantities of water. If that concept did not include sand and gravel, it would be necessary to consider what rules or principles of international law governed transboundary groundwater systems which were not aquifers.

15. Speaking on behalf of the European Union, he said that when the Commission studied the possibility of adapting the draft articles on State responsibility for internationally wrongful acts to the responsibility of international organizations, it should remember the diverse nature of those organizations, a diversity to which the European Union and the European Community bore testimony.

16. **Mr. Kuijper** (Observer for the European Commission) said that the European Community was an international organization with special features. Under its founding treaties, member States had transferred some of their competences to the organization, but the European Community was far from being a State; it relied on the authorities of its member States to apply and enforce its acts and regulations. The specific character of the European Community should be taken into account in the Commission's draft articles on responsibility of international organizations.

17. According to draft article 3, paragraph 2, as provisionally adopted, there was an internationally wrongful act of an international organization, entailing the international responsibility of that organization, when conduct was attributable to the international organization and constituted a breach of an international obligation of that organization. The normal situation envisaged by the draft article, therefore, was that conduct could be attributed to the organization that was the bearer of the obligation. However, there could be cases in which the European Community could be considered responsible for the infringement of international obligations because of the conduct of member States. The European Community was a party to many treaties and the bearer of many international obligations. If, for example, the Community had agreed to a certain tariff treatment

with third States, the agreement might be breached by customs authorities of member States charged with implementing Community law. In short, there was a separation between responsibility and attribution of conduct.

18. The special situation of the European Community and other potentially similar organizations could be accommodated in the draft articles by special rules of attribution of conduct, so that the actions of organs of member States could be attributed to the organization, by special rules of responsibility, so that responsibility could be attributed to the organization, even if organs of member States were the prime actors of a breach of an obligation borne by the organization, or by a special exception or saving clause for organizations such as the European Community. The Community would prefer to work towards one of the first two solutions and would be interested in hearing whether other international organizations had the same problems.

19. The definition of "rules of the Organization" in draft article 4, paragraph 4, could be improved by changing the words "established practice" to "generally accepted practice", with less stress on the time element, and by adding a reference, either in the text or in the commentary, to the general principles of law of the organization and to the case law of an organization's tribunal. Draft article 5 aptly summarized the relevant principles for attribution of conduct of organs or agents placed at the disposal of an international organization by a State or another international organization. It appeared from the commentary that the Commission was thinking primarily in terms of factual control, whereas it would be more relevant to the specific situation of the European Community to think in terms of effective legal control.

20. **Mr. Läufer** (Germany) said that his delegation fully agreed with the points raised by the Netherlands and the European Commission. The draft articles on responsibility of international organizations focused on the question of attribution of conduct, on the understanding that attribution might be dual or even multiple. However, the question remained as to the circumstances in which conduct attributed to the organization might entail the responsibility of its member States. With regard to draft article 4, his delegation commended the decision to give a broad definition of the term "agent" and to refer in the commentary to the definition of the International Court of Justice in its advisory opinion on *Reparations for injuries suffered in the service of the United Nations*. A broad definition was crucial in view of the variety of international organizations.

21. His delegation shared the Commission's view that the core criterion for the attribution of ultra vires conduct was the requirement that the organ or agent had acted in that capacity. Draft article 6 therefore excluded acts performed in a private capacity, thus safeguarding the requirement that there should be a close link between the attributable conduct and the functions of the organ or agent. In the case of organs or agents placed at the disposal of an international organization, attribution of conduct must be based on the criterion of effective or factual control, which his delegation considered one of the guiding principles of the entire concept of responsibility of international organizations. However, in its efforts to identify general rules on the attribution of conduct of organs or agents lent to an organization, it seemed that the Commission was placing too much emphasis on the special case of States contributing troops to United Nations peacekeeping operations.

22. His delegation supported the approach of resorting wherever possible to the solutions already found within the context of the responsibility of States, but was not convinced that the concept of necessity could be carried over to the responsibility of international organizations. Concerning the legal nature of the rules of the organization in relation to international law, the issue of possible breaches by the organization of its obligations towards its member States should be included only to the extent that it might affect the attribution of conduct or responsibility. As the Commission had requested, Germany would soon transmit a compilation of its State practice on the responsibility of international organizations.

23. On the topic "Shared natural resources", Germany expressly supported the aim of better protecting transboundary groundwaters through international cooperation and on the basis of regulations under international law. The question should be addressed as to how to achieve that goal as efficiently and flexibly as possible. Since preparing, negotiating and implementing a global convention on transboundary groundwaters appropriately in each region would presumably be a lengthy process, it would be useful to consider an approach in which different "building blocks" were formulated and

offered to meet the different regional or technical starting points. That approach, rather than a global convention, would make it possible to reach legally binding regulations more closely geared to specific regional problems and to achieve practical results more quickly and efficiently. The United Nations Environment Programme, given its experience with international legislation in the environmental sphere, could help the Commission in developing that approach.

24. *Mr. Bennouna (Morocco) took the Chair.*

25. **Mr. Kendall** (Argentina) said that his country, as a Guarani aquifer system State, had a special interest in the topic of shared natural resources and transboundary groundwaters. The concept of a "shared" natural resource in no way implied that the resource in question constituted a shared heritage of mankind or was subject to shared ownership. It meant that the resource was subject to shared management by the countries to which it exclusively belonged, i.e., the States in which it was situated and, specifically in the case of groundwaters, the States in which aquifers were situated. Argentina believed that in the commentary and, perhaps, the preamble to the draft articles, explicit reference should be made to ownership by the States in which the resource was situated, without any specific norm recognizing such attribution being required, particularly since ownership was not an issue that required special normative treatment. It was possible to treat groundwaters in a similar manner to petroleum and gas with regard to their ownership, but not with regard to their use, management, protection and preservation.

26. There was therefore no need to change the current title of the topic, i.e. "Shared natural resources". Argentina agreed that the sub-topic should be entitled "Transboundary groundwaters", and that the terms "aquifer" and "aquifer system" should be used. The question of the link between an aquifer system and domestic watercourses and recharge and discharge areas should be studied. Non-transboundary aquifers were outside the scope of the topic and there was no need to define the term "groundwaters".

27. Argentina believed that the customary norms established under the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses offered a basis for the elaboration of a groundwater regime. The norms relative to liability deserved special and separate mention. The principles applicable to surface waters could be applied to groundwaters, provided they were expanded and adapted to the specific characteristics of the latter. The Commission should first define the general principles applicable to all groundwaters. It should develop the principles governing surface waters that could be adapted to groundwaters, and also develop specific principles for certain types of aquifers, such as those not hydrologically linked to surface waters. Argentina agreed with the Special Rapporteur that recharge and discharge areas should also be regulated in order to ensure proper aquifer management. The principles of equitable use and reasonable utilization could appropriately be applied to water resources and should be taken into account by the Commission, taking into account the particular characteristics of groundwater resources.

28. His delegation considered the treatment of liability in draft article 4, paragraph 4, to be unacceptable, and agreed that work on the articles concerning prevention of transboundary harm resulting from hazardous activities should proceed with caution.

29. Irrespective of the form in which the norms were finally adopted, they must be directed at the States in which the resources were situated since those were the States that had a duty to apply and develop them in their mutual relations through regional and subregional agreements.

30. It would be imprudent to say, as the Special Rapporteur had done, that the Guarani aquifer system "practically" did not receive recharge or that it was not connected with surface waters, especially since studies were being conducted to provide further information and better understanding of the system's features, including its recharging areas. The Special Rapporteur's analysis should be confined to the technical data provided by the States in which the transboundary resources were located, particularly in view of the current four-year project for the environmental protection and integrated sustainable management of the Guarani aquifer. In addition to the technical work undertaken within the framework of that project, the Southern Common Market (MERCOSUR) Council had set up an ad hoc high-level working group on the Guarani aquifer to draw up a draft agreement among the MERCOSUR member States which would establish the principles and criteria for safeguarding the rights of those States over their

groundwater resources. The draft agreement might also include conditions and guidelines for the management and monitoring of the Guarani aquifer.

31. Argentina believed it would be useful for the Guarani aquifer system States to provide the Commission with information on the system. It should also be noted that the norms to be considered by the Commission were those emerging from international practice, since non-governmental bodies such as the International Law Association did not formulate norms.

32. **Mr. Ferrari-Bravo** (Italy), referring to chapter V of the Commission's report said that the rules adopted by the Commission had taken into consideration the importance of the factual element in the attribution of conduct to an international organization, especially in the case of an organ placed at the disposal of an international organization by a State, or another international organization. Italy agreed with the approach taken by the Commission whereby it refrained from formulating exceptions to the rules on the attribution of conduct to a State, as adopted on second reading in 2001. The conduct of an organ of a State should remain attributable to that State even if such conduct had taken place on the basis of a decision by an international organization of which the State was a member. The question remained as to what extent the international organization was responsible in such a situation. The answer might be found by analysing the factual circumstances that would make it possible to establish the extent to which the organization had contributed to the conduct of the State. If the State was not bound by the international obligation in question, the international organization would be the only party deemed responsible.

33. The issue of the subsidiary responsibility of member States in the case of responsibility of an international organization, raised by the Commission with commentary to draft article 1, should be examined within the framework of exceptions to the rule set out in draft article 3, in which responsibility did not presuppose attribution. It was not certain whether a uniform solution, applicable to all international organizations, could be found.

34. Turning to the topic "Shared natural resources", he welcomed the efforts made by the Commission and the Special Rapporteur to collect all the necessary relevant scientific and technical data. It would be useful to establish some specific obligations, given the vulnerability of aquifers to pollution and excessive exploitation, and his delegation hoped that such obligations would be dealt with in future draft articles. Insofar as groundwaters fell within the scope of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, it would be desirable to ensure compatibility between that Convention and the new instrument envisaged, perhaps through the elaboration of a draft protocol additional to the Convention.

35. **Mr. Romeiro** (Brazil), referring to the topic "Shared natural resources", said that the increased participation of countries in discussions on the topic revealed a growing interest in it and the readiness of many States to assist the Commission in its work on that complex issue.

36. Brazil welcomed the focus on transboundary groundwaters, and agreed that a step-by-step approach should be pursued. States bore the primary responsibility for the management of their groundwater resources, but although that responsibility took precedence over their commitments at the international level, the two principles were not incompatible. Thus, in the management of transboundary resources, regional approaches played an important role in reconciling national interests and international concerns. In addition to regulating accessibility to those resources, regional commitments reaffirmed fundamental principles such as the obligation not to cause harm and the strengthening of cooperation practices.

37. Referring to the ad hoc high-level group established to set up a legal framework to regulate the principles, rights and duties of Guarani aquifer system States, he took the opportunity to reaffirm the MERCOSUR member States' belief that groundwaters belonged to the territorial domain of the States under whose soil they were located and that the Guarani aquifer system was located in the area comprising MERCOSUR countries. Water resources belonged to the States in which they were located and were subject exclusively to the sovereignty of those States. In that regard, it was important to reiterate the principle of sovereignty regarding the use of transboundary resources contained in General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources.

38. **Mr. JIA Guide** (China), referring to chapter V of the Commission's report, said that his delegation could support the four draft articles on the attribution of conduct to international organizations. Article 4, paragraph 1, was of particular importance as it established the general rule on attribution of such conduct. The definition of "rules of the organization" was acceptable, but the reference to "established practice" was somewhat unclear. The designation of a specific practice of an international organization as an "established" practice depended not only on the organization itself, but also on the attitude of the respondent State. In practice, States might not always have an opportunity to state their position on whether a specific act of an organization constituted an established practice. It would therefore be advisable to take a cautious, case-by-case approach to the question.

39. The "effective control" criterion established in draft article 5 was an appropriate way of addressing the question of attribution of "conduct of organs or agents placed at the disposal of an international organization by a State or another international organization". The degree of attribution depended on the degree of effective control. It must be borne in mind, however, that the "effective control" criterion was an evolving rule, with some supporting evidence but without a common understanding on what type of control constituted "effective" control.

40. With regard to the commentaries, draft articles 4 to 7 dealt with attribution of conduct, and there was therefore no need to deal with attribution of responsibility, as was done in paragraph 3 of the commentary in paragraph 72 of the report.

41. Turning to the first of the specific issues relating to the topic "Responsibility of international organizations" raised by the Commission in paragraph 25 (a) of the report, he said that breaches of obligations that an international organization might have towards its member States or its agents fell within the purview of the topic and should be studied by the Commission. Such a study could be undertaken from the perspective of conduct in breach of international obligations, which was a premise for responsibility of an international organization. The study would thus address the legal nature of rules governing relationships between international organizations and their members or agents, including rules of international organizations, with a view to ascertaining what relationships were regulated by international law and which rules could be considered as international law. In general, only relationships regulated by international law could involve breaches of international obligations.

42. As for the second special issue, (para. 25 (b) of the report) namely whether necessity could be invoked by an international organization to preclude wrongfulness, his delegation believed that it could not. While States were entitled to invoke necessity to safeguard their essential interests, it would be inappropriate for an international organization to do so. Naturally, necessity could be invoked for reasons other than the protection of essential interests and thereby become a pretext for non-compliance with international obligations or for infringement of the rights of another State. However, the commentaries to the draft articles on responsibility of States for internationally wrongful acts showed clearly that the draft proposed strict restrictions on the application of the necessity criterion. When drafting those articles, the Commission had been aware of the danger posed by abuse of the criterion. An international organization could perfectly well safeguard its essential interests pursuant to international law.

43. With regard to the specific issues, set out in paragraph 25 (c) of the report, he believed that they could be addressed by using the criterion of effective control, in the sense of "legal" control. If a member State were obligated, pursuant to a resolution of an international organization, to take a certain course of action in breach of international law, then in principle both the organization and the State should bear international responsibility. The degree of their respective responsibility would depend on the degree of legal control exerted. In the case of action taken by a member State at the request of an organization and in breach of international law, the requesting organization bore a relatively higher responsibility due to its generally greater degree of legal control. On the other hand, in the case of State conduct which was in breach of international law and only authorized by an organization, the responsibility of the authorizing organization would be lighter, given the relatively wide latitude the authorized State possessed to determine what action, if any, to take.

44. Turning to the topic "Shared natural resources", he said that China in principle supported the framework and draft articles presented by the Special Rapporteur. It agreed that the word "shared" should be dropped from the title of the topic, and that the term

"confined transboundary groundwaters" should be replaced with "transboundary aquifer systems".

45. With respect to the relationship between the proposed draft articles and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, he said that since transboundary aquifer systems could be connected to surface waters, the question of the relationship between the two instruments did arise. The issue could be resolved by the legal device of including specific provisions in the draft articles, or by limiting the scope of the study mainly to "confined underground aquifer systems", with the understanding that "aquifer systems" could be linked to surface waters, but that such a link would be weak and negligible. Furthermore, China shared the view that the basic principles embodied in the 1997 Convention could not be automatically transposed to cover transboundary aquifer systems. The Commission might also wish to consider including in the draft articles the principle of sovereignty of States over their natural resources.

46. As to the question whether the term "significant harm" should be used in draft article 4, he considered that the concept was applicable in that context. What constituted "significant harm" should be judged on case-by-case basis. China believed the term "harm" in that context meant harm caused to other States, and considered that the rights and obligations of States relating to activities that might affect transboundary aquifer systems should be emphasized to give prominence to the status of States, without prejudice to the use of resources by specific individuals and groups, which should be governed by domestic measures taken by the State concerned.

47. The issue of liability, in relation to the "question of compensation" mentioned in draft article 4, paragraph 4, could be dealt with in connection with the topic "International liability for injurious consequences arising out of acts not prohibited by international law". There was no need to over-regulate liability under the current topic unless harm resulted from a violation of international law. With regard to the final form of the proposals, that question could be decided after progress had been achieved on substantive matters.

48. **Mr. Paolillo** (Uruguay) said that the issue of transboundary aquifer systems was of particular interest to his delegation, since part of the Guaraní aquifer was located in Uruguayan territory. Despite the lack of practical experience with regard to that issue, the Special Rapporteur had produced an excellent report. Although the Special Rapporteur had made no recommendation concerning the final form of the Committee's conclusions, his delegation would prefer that the Committee make recommendations or establish guidelines which States could take into account when entering into bilateral or regional treaties for the preservation and use of shared aquifers. Such a solution was preferable because of the lack of practical experience in that area, but above all because of the widely varying characteristics of transboundary aquifer systems; standards for their preservation and use must therefore be established taking those differences into account. He agreed with the Special Rapporteur that universal standards which might be established by the Committee could provide a model for regional agreements.

49. The Guaraní aquifer, for example, was one of the largest underground reserves of water in the world, yet its capacity for renewal was insignificant compared to its total volume and potential uses. That fact required great prudence when establishing the principles for its management. Comprehensive studies of the Guaraní aquifer were under way with a view to ensuring that the members of the Southern Common Market (MERCOSUR) adopted appropriate regulations for that purpose. Studies on aspects such as environmental protection and the sustainable development of the aquifer had been undertaken with international financial support.

50. At the judicial level, and at the initiative of his Government, the MERCOSUR countries were working to establish fundamental principles on which to base future regulations and measures relating to the preservation and use of the aquifer. A panel of legal experts had been established with a view to drafting a basic text which would shortly be submitted to the Governments concerned. The negotiations were based on three principles: the portion of the Guaraní aquifer lying in the territory of each country was under its sovereignty and, without prejudice to any cooperation efforts, each member State of MERCOSUR was solely responsible for the management of that portion of the aquifer located in its territory; preservation of the aquifer with a view to its rational and sustainable use; and respect by each State of the obligation to cause no significant harm to the other States. In that context, he said that although the 1997 Convention on the Law of

the Non-Navigational Uses of International Watercourses was not directly applicable to the management of a transboundary aquifer system, many of its principles were applicable or could be adapted for that purpose and that Convention should therefore be taken into account by the Commission.

51. The draft articles prepared by the Special Rapporteur provided a good starting point but required further clarification, in particular with regard to their scope of application. He expressed concern that there was some ambiguity in the definitions of the terms used; for example, in draft article 2 (a) reference should be made to the water contained in the aquifer rather than limiting the definition to "water-bearing rock formation". Furthermore, the much-discussed notion of "exploitable" should perhaps be replaced by the notion of usable, which was a more objective criterion; accordingly, in draft article 1 the term "uses" should be retained and not be replaced by "exploitation", as had been suggested during the Commission's discussions.

52. In addition, in draft article 4, paragraph 3, the word "impair" should be replaced by the word "alter", which would be a clearer and more objective criterion. With regard to paragraph 4 of the same article, the use of the words "significant harm" should be carefully studied. Although the reasons given by the Special Rapporteur for using that language were quite convincing, given the extreme vulnerability of the resource, which was not always renewable, the Commission should perhaps consider whether it would be appropriate to use language which implied something less than "significant harm".

53. **Mr. Currie** (Canada) said the framework for formulating draft articles on transboundary aquifer systems proposed by the Special Rapporteur, emphasizing the protection of aquifers, bilateral cooperation and sharing of information and data was an important step forward. Reliance on the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses as a framework for a new convention dealing with groundwaters should, however, be balanced with other approaches, especially since the 1997 Convention was not yet in force and still lacked considerable international support; exploration of other approaches could contribute to a consensus on the new draft articles. He also cautioned that the provisions of the current framework that would allocate water resources located in aquifers between States on the basis of similar provisions in the 1997 Convention might prove controversial.

54. The Special Rapporteur himself had recognized that continued research and study on groundwaters were necessary to develop the draft articles further and, in that context, he said that his Government was preparing written comments in reply to the Commission's request for information on relevant State practice. As a preliminary comment on Canada's experience, he noted that existing Canada-United States bilateral instruments, such as the Boundary Waters Treaty, did not apply to groundwaters, although the International Joint Commission had conducted studies on groundwater issues.

55. **Mr. Tajima** (Japan), referring to the topic "Responsibility of international organizations", re-emphasized the difficulty of drafting guiding principles on the matter, given the diversity of such organizations with regard to their structure, legal status, activities and membership. That had been made clear during the Commission's discussion of the "rules of the organization" in the context of attribution of responsibility to international organizations. The examples referred to in draft article 4 (paragraph 4), such as constituent instruments, decisions and resolutions, although non-exhaustive, could help to identify the rules to be applied to a particular organization, yet the nature of each document differed from one organization to another and required a case-by-case analysis. Furthermore, the standard of "effective control" (draft article 5), used to determine the responsibility of the organization, required clarification; while a general criterion applicable to all kinds of international organizations would be desirable, he wondered how it would be applied in practice. Too vague a definition might bring the validity or effectiveness of the standard into question but too detailed a definition might make the standard impractical for across-the-board application.

56. He supported the approach adopted by the Special Rapporteur, namely that of following the basic structure of the draft articles on State responsibility and identifying any elements not applicable to the responsibility of international organizations. Although that might only serve to highlight the diversity of international organizations and the differences between them and States, it would certainly help in identifying areas which required further analysis. In that context, the question raised by the Commission regarding the

applicability of "necessity" in the context of internationally wrongful acts (A/59/10, para. 25 (b)) was a valid one and suggested that case studies might be useful in identifying when and whether international organizations might be justified in invoking such grounds.

57. As for the possible difference in the responsibility of organizations according to whether they "requested" or only "authorized" an action by a State, it was difficult to give a general answer; differences in the nature of the role played by the organization, and of any action taken by the State as a result, could influence the determination of the organization's responsibility. The Commission's work on that issue was still in its early stages and it remained to be seen whether the draft articles should remain quite general or whether there were areas where more specific drafting might be possible.

58. Turning to the topic of "shared natural resources", he said that, given the importance of groundwaters for the daily life of humanity, it was appropriate for the Commission to have chosen transboundary groundwaters as a starting point. The lack of State practice in that regard justified caution in establishing a legal framework and he welcomed the Special Rapporteur's efforts to obtain assistance from groundwater experts from international organizations. Avoidance of the use of the sensitive term "shared resources" would avert a complex debate over the common heritage of mankind or shared ownership.

59. The scope of the proposed convention should not be limited to groundwaters not covered by the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. Some of the aquifer systems covered by the latter had characteristics of groundwaters and should be governed by a new convention on that question; problems arising from dual applicability could be addressed in an appropriate provision in the new convention. The 1997 Convention did provide a base upon which to build a groundwater regime, but any new legal framework should take fully into account the unique characteristics of groundwaters. The current framework proposed by the Special Rapporteur was acceptable and the Special Rapporteur should continue preparing draft articles, leaving the issue of the final form of the legal framework to be decided at a later stage. He looked forward to the presentation of draft articles for all the remaining segments in 2005. Careful analysis of State practice and existing international agreements would be indispensable, in particular with regard to the use of aquifer systems.

Agenda item 162: Observer status for the South Asian Association for Regional Cooperation in the General Assembly (*continued*) (A/59/234 and A/C.6/59/L.21)

60. **The Chairman** said he took it that the Committee wished to adopt draft resolution A/C.6/59/L.21 without a vote.

61. *Draft resolution A/C.6/59/L.21 was adopted.*

Agenda item 142: Convention on jurisdictional immunities of States and their property (*continued*) (A/59/22 and A/C.6/59/L.16)

62. **Mr. Bühler** (Austria), introducing draft resolution A/C.6/59/L.16 on behalf of the Bureau, said that it represented the culmination of 27 years of work and reflected the will of the international community to regulate the jurisdictional immunities of States and their property in a uniform manner for the benefit of the development of economic relations between States on the one hand and private companies and other actors on the other. The draft resolution noted, inter alia, the need for uniformity and clarity in the law of jurisdictional immunities of States and their property (seventh preambular paragraph) and stated explicitly that the United Nations Convention on Jurisdictional Immunities of States and Their Property did not cover criminal proceedings (para. 2).

63. The text of the Convention was contained in the annex to the draft resolution. The date until which the Convention would be open for signature had been left blank (art. 28) and the date of the opening for signature (art. 33) had likewise been left blank in order to give the Secretariat enough time to prepare the text for signature. It was proposed to open the Convention for signature as of 17 January 2005 for a period of two years, until 17 January 2007, after which date the Convention would remain open for accession. If those dates met the approval of the Committee, the Secretariat would make the necessary changes in articles 28 and 33. He recommended that the draft resolution be adopted by the Committee without a vote.

64. **The Chairman** said the Secretariat would add the dates in question to articles 28 and 33 of the text of the

draft Convention to be issued in the report of the Committee.

Statement by the President of the International Court of Justice

65. **Mr. Shi** Jiuyong (President of the International Court of Justice) said that in the course of the year ending 31 July 2004, the International Court of Justice had held hearings relating to 12 cases, rendered three final judgements and delivered one advisory opinion, and it currently had 21 cases listed on its docket. The thriving contentious side of the Court's work demonstrated the confidence that States placed in it. However, he would like to draw attention to the Court's generally less known but nonetheless extremely important advisory function, which was underutilized but could be an extremely valuable tool for United Nations bodies.

66. The advisory function of the Court had its origins in Article 14 of the Covenant of the League of Nations concerning the establishment of the Permanent Court of International Justice. The Permanent Court had been authorized to give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly of the League of Nations, and its subsequent 27 advisory opinions over the course of two decades had greatly facilitated the work of the Council by offering a solid legal basis for the final settlement of international disputes. Although its advisory opinions had not been not binding in nature, they had invariably been given authoritative status by the organs and States concerned. Despite initial concerns that the advisory function might be incompatible with the judicial role, the Permanent Court had derived significant prestige from its advisory function and had made an exemplary contribution to the development of international law in the period between the two world wars.

67. With the establishment of the United Nations and the International Court of Justice as its principal judicial organ, the advisory competence had been widened in scope. According to Article 96 of the Charter, not only could the General Assembly and the Security Council request the Court to give an advisory opinion on any legal question, but the General Assembly could authorize other organs of the United Nations and specialized agencies to request advisory opinions on legal questions arising within the scope of their activities. Currently there were 20 such bodies. The Security Council had made use of its prerogative only once; nearly one third of all requests for advisory opinions had emanated from the General Assembly; and the Court had delivered nine advisory opinions at the request of other United Nations organs and specialized agencies. On one occasion, in the advisory opinion on *Legality of the use by a State of nuclear weapons in armed conflict*, the Court had decided that it lacked jurisdiction to reply to one such request submitted by the World Health Organization because the request did not relate to the scope of activities of that organization.

68. Article 65 of the Statute of the International Court of Justice had always been interpreted as conferring discretion upon the Court whether to give the opinion requested, but the Court, like its predecessor, had always considered that there must be compelling reasons for it to exercise its discretion not to render an advisory opinion. Concerns about the propriety of the Court's exercise of its advisory function arose when the subject matter of the request was connected with an actual dispute between States or a legal question actually pending between two or more States. While consent of the parties was required for contentious proceedings, it was not set out in Article 96 of the Charter as a condition for advisory jurisdiction. However, the Court had always held that it was obliged, even when giving advisory opinions, to respect the essential rules guiding its activities as a court of justice, including the principle that a State was not obliged to allow its disputes to be submitted to judicial settlement without its consent.

69. Nonetheless, the Court had never declined to give its opinion simply because there was some connection between a dispute involving States and the subject of the request. In a number of cases, the Court had construed the question before it as relating to the exercise of the functions of the requesting United Nations organ rather than to any ongoing dispute. In its most recent advisory opinion on *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, the Court had decided that its pronouncement would not have the effect of circumventing the principle of consent to judicial settlement, on the grounds that the question put by the General Assembly was far broader than the bilateral dispute and was of particularly acute concern to the United Nations.

70. When considering its advisory jurisdiction, the Court was subject to the requirement of Article 96 of the Charter that the question put to it should be a legal question. However, the fact that such a question might arise in a political context was not sufficient to deprive the Court of jurisdiction. In its famous dictum in its advisory opinion on *Western Sahara*, it had held that questions framed in terms of law and raising problems of international law were by their very nature susceptible of a reply based on law. The Court to date had never found that political arguments surrounding a legal question put to it constituted a compelling reason for it to decline to exercise its advisory jurisdiction.

71. Advisory opinions were non-binding: even the requesting body was not obliged to accept the Court's conclusions, although in fact both the Council of the League of Nations and the various agencies of the United Nations had always done so. States and other international entities were also entitled to agree among themselves that the opinion would be binding on them. Some treaties even stipulated that, in the event of a dispute, an advisory opinion of the Court would be considered decisive or binding. One such was the advisory opinion on the *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, in which the Court had distinguished between the advisory nature of the Court's task and the particular effects that parties to an existing dispute might wish to attribute, in their mutual relations, to an advisory opinion of the Court.

72. With that background, a pertinent question was why recourse to the Court's advisory function should be encouraged and how it might be developed. The advisory procedure enabled the Court to contribute to the overall objectives of the United Nations by playing a role in international dispute resolution and prevention and by clarifying and developing international law. Thus, for example, having asserted that the construction of the wall by Israel in the Occupied Palestinian Territory was contrary to international law, the Court had found that the United Nations, and especially the General Assembly and the Security Council, should consider what further action was required to bring the situation to an end, taking due account of the advisory opinion. Moreover, in the past, there had been instances in which States had found it more acceptable for an advisory opinion to be requested than for contentious proceedings to be instituted. Thus, in the *European Commission of the Danube* case, Romania had rejected the option of seeking adjudication via the contentious procedure but had agreed to the request for an advisory opinion as a compromise.

73. The advisory procedure could also play an indirect role in preventing disputes or conflicts from developing by clarifying the legal parameters within which a problem might be resolved. The case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* had dealt not only with an organizational issue and the depositary functions of the Secretary-General but also with a general problem of treaty law, namely the legal effect of reservations to a multilateral treaty and of the objections made by other parties. In its advisory opinion of 1971 on the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, the Court had interpreted Article 27 of the Charter of the United Nations. Moreover, advisory opinions enabled the Court to determine the current status of particular principles and rules of international law. Thus it had given its advisory opinion on Western Sahara in response to two questions put by the General Assembly regarding the legal status of that Territory. In the case concerning the *Legality of the threat or use of nuclear weapons*, the Court had noted that the international community was profoundly divided on the matter but it had stressed the applicability of the principles and rules of humanitarian law to a situation involving the possible use of nuclear weapons.

74. The Court's opinions had also been useful in establishing points of the law of international organizations, particularly since entities other than States could not have recourse to the Court's contentious jurisdiction. Thus, in the case concerning *Reparation for injuries suffered in the service of the United Nations*, the Court had stated that, in its view, the United Nations had been created as an entity possessing objective international personality and not merely personality recognized by its Members alone. That opinion had paved the way for the clarification of important aspects of the international legal personality of intergovernmental organizations. Other examples had included the case concerning *Judgements of the Administrative Tribunal of the International Labour Organization (ILO) upon complaints made against the United Nations Educational, Scientific and Cultural*

Organization (UNESCO), which had addressed the question of whether judgements by the ILO Administrative Tribunal were binding on UNESCO. Similarly, the case concerning the *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization* had been instrumental in reconstituting the Maritime Safety Committee of the organization that had later become the International Maritime Organization.

75. It was, perhaps, surprising that in 58 years the Court had been asked to give advisory opinions on only 24 occasions; comparatively speaking, that was far fewer than the Permanent Court of International Justice during its 17 years' existence. There was a feeling in some quarters that the procedure could be useful in addressing many more international problems. Without seeking to prejudge the question, he wished to put forward some of the possible ways in which that could be achieved.

76. Thought could be given to broadening the field of application of the Court's advisory jurisdiction *ratione personae*. In other words, given their growing importance, intergovernmental organizations could be authorized to request opinions directly. Since such a change might raise certain legal difficulties in relation to the interpretation of the Charter of the United Nations, it had been suggested that access to the advisory procedure might be given to a wider group of intergovernmental organizations, which could then ask for opinions using the General Assembly or the Security Council as an intermediary.

77. Another suggestion was to empower the Secretary-General to request advisory opinions on his own initiative. Currently, he could only place a question on the agenda of an organ and suggest that it should become the object of a request for an advisory opinion, as had indeed been the approach taken in 1990 by the Secretary-General of the time and again in 2001 by the current Secretary-General. Other, perhaps less "mainstream", suggestions that had been made included the idea of authorizing national supreme courts and international courts to request advisory opinions on difficult or disputed questions of international law.

78. He did not claim that any of the options put forward represented a definitive way of reinvigorating the Court's advisory procedure. He merely drew attention to them in order to stimulate debate among policy makers. The advisory procedure had some clear advantages: it could contribute to the progress of international law but combined the judicial approach with the flexibility offered by the fact that its opinions were not binding.

79. **Mr. Kanu** (Sierra Leone) said that the President of the International Court of Justice had made a number of extremely thought-provoking suggestions. In particular, with regard to the fact that the parties requesting an advisory opinion were not obliged to accept that opinion, the United Nations should find some way of addressing the question. There was no point in requesting an advisory opinion unless some way could be found of ensuring that it was respected by the parties concerned.

80. **Mr. Shi** Jiuyong (President of the International Court of Justice) said that the Court adhered strictly to its Statute, under which advisory opinions had no binding force. Nonetheless, international organizations — and, in particular, the General Assembly — had always fully respected the Court's advisory opinions.

The meeting rose at 12.45 p.m.